

STATE OF MICHIGAN  
COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

CLIFFORD TREADWELL,

Defendant-Appellant.

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UNPUBLISHED

January 25, 2000

No. 206342

Recorder's Court

LC No. 97-003400

Before: White, P.J., and Hood and Jansen, JJ.

PER CURIAM.

Defendant was convicted by a jury of armed robbery, MCL 750.529; MSA 28.797, and sentenced to ten to twenty-five years' imprisonment. He appeals as of right. We affirm.

Defendant first argues that the trial court's jury instructions failed to inform the jury that it was required to find that he intended to rob the victim at the time he committed the assault. Because defendant did not request a specific instruction on this issue, or object to the instructions as given, this issue is not preserved for appeal and appellate relief will be granted only to avoid manifest injustice. *People v Van Dorsten*, 441 Mich 540, 544-545; 494 NW2d 737 (1993).

This Court reviews jury instructions in their entirety to determine if error requiring reversal occurred. *People v Caulley*, 197 Mich App 177, 184; 494 NW2d 853 (1992). The instructions must include all elements of the charged offense and must not exclude material issues, defenses and theories if there is evidence to support them." *Id.* Even if the instructions are somewhat imperfect, there is no error if they fairly presented the issues to be tried and sufficiently protected the rights of the defendant. *Id.*

The record indicates that the trial court instructed the jury on the elements of armed robbery in accordance with CJI2d 18.1, and specific intent in accordance with CJI2d 3.9. Viewed as a whole, the instructions are consistent with the law of this state, which views robbery as a continuous offense. *People v Tinsley*, 176 Mich App 119, 121; 439 NW2d 313 (1989). The instructions also sufficiently informed the jury that defendant must have intended to rob the victim at the time of the assault.<sup>1</sup> Moreover, to the extent defendant claimed that he only used force to defend himself from the victim, the

court's instruction on self-defense adequately covered this defense theory. Because the court's instructions sufficiently protected defendant's rights, appellate relief is not warranted.

Next, defendant argues that the trial court erred by denying his motion for a mistrial after the victim commented on defendant's drug use and mentioned that defendant and other members of his family had previously been in prison. We review the trial court's denial of a mistrial for abuse of discretion. *People v Wolverton*, 227 Mich App 72, 75; 574 NW2d 703 (1997). An abuse of discretion will be found only where the court's denial deprived the defendant of a fair and impartial trial. *Id.*

A mistrial is generally not warranted where a prosecution witness provides an unresponsive answer and there is no indication that the prosecutor conspired with or encouraged the witness to give the response or knew in advance that the witness would provide the unresponsive testimony. *People v Hackney*, 183 Mich App 516, 531; 455 NW2d 358 (1990); *People v Taylor*, 159 Mich App 468, 489; 406 NW2d 859 (1987). This is what occurred here; it is apparent from the record that the challenged information was nonresponsive and unsolicited. Further, the trial court gave a cautionary instruction directing the jury to disregard the reference to defendant's prior imprisonment. Moreover, observing that evidence regarding the entire transaction is sometimes necessary to place the events in context, even if the facts show that other crimes were committed, *People v Sholl*, 453 Mich 730, 740-742; 556 NW2d 851 (1996), we do not perceive any undue prejudice from the victim's opinion testimony that defendant appeared to have been using drugs at the time of the offense, where the victim was questioned regarding the basis for this opinion, and the testimony might be seen as explaining defendant's alleged behavior. Further, any prejudice stemming from the prosecutor's statements in closing argument on this subject was sufficiently dispelled by the trial court's instruction to disregard the statements. Under these circumstances, we conclude that the trial court did not abuse its discretion in denying defendant's motion for mistrial.

Defendant next claims that the trial court failed to properly handle a situation involving possible jury contamination during the jury voir dire process. The record indicates that the trial court questioned both the witness and the juror involved in the incident to determine if other potential jurors may have been exposed to their conversation, as defense counsel requested. The testimony revealed that no other jurors were present or nearby when the subject conversation occurred, and defense counsel appeared satisfied with the trial court's handling of the situation in that he did not request any further action by the court or place any further objection on the record after the witness was questioned and the juror was excused. Further, defendant has not provided this Court with the transcript of jury voir dire and does not argue that he was prevented from exploring this issue with any potential jurors during voir dire. Under these circumstances, defendant has failed to demonstrate that this issue was properly preserved below, or that he was prejudiced by the court's handling of the situation. *People v Bell*, 209 Mich App 273, 278; 530 NW2d 167 (1995).

Defendant next argues that trial counsel was ineffective for not requesting the victim's medical records to determine whether the victim's alleged injuries were suffered in a fall two days before the assault, rather than in the assault. In his supplemental brief filed in propria persona, defendant makes the same argument with regard to his appellate counsel. In order for this Court to reverse due to ineffective

assistance of counsel, defendant must show that his counsel's performance fell below an objective standard of reasonableness, and that the representation so prejudiced defendant that he was denied the right to a fair trial. *People v Pickens*, 446 Mich 298, 338; 521 NW2d 797 (1994). Defendant must also overcome the presumption that the challenged action might be considered sound trial strategy. *People v Tommolino*, 187 Mich App 14, 17; 466 NW2d 315 (1991).

Accepting *arguendo* defendant's argument that production of the victim's medical records would properly have been compelled if the issue had been presented differently by counsel, defendant has not shown that he was prejudiced. After reviewing the record and testimony concerning the nature and extent of the victim's injuries immediately after the charged assault, especially the police officer's testimony, we conclude that the disputed evidence, had it been admitted, would not have affected the outcome of these proceedings. Medical records concerning the alleged fall two days earlier would not have established that defendant did not commit the alleged assault and severely injure the victim. Even if the records established that the complainant lied about the prior incident, we do not believe the jury would have come to a different conclusion, in light of the testimony regarding victim's condition after the charged assault. Accordingly, ineffective assistance of counsel has not been established.

Defendant also challenges the proportionality of his minimum sentence of ten years. This Court reviews sentencing decisions for an abuse of discretion by applying the principle of proportionality and determining if the sentence imposed is proportionate to the seriousness of the circumstances surrounding the offense and the offender. *People v Milbourn*, 435 Mich 630, 636; 461 NW2d 1 (1990). Because defendant's minimum sentence is within the guidelines' recommended minimum sentence range of five to twenty-five years, it is presumptively proportionate. *People v Hogan*, 225 Mich App 431, 437; 571 NW2d 737 (1997). Contrary to defendant's argument, the trial court did consider the fact that this offense occurred in a domestic setting, a factor that persuaded the court to sentence defendant near the middle of the guidelines' recommended range. Considering the circumstances of this offense in conjunction with defendant's extensive criminal record, defendant has failed to show that his sentence is disproportionate.

Defendant raises several other issues in his supplemental brief filed in propria persona. Defendant admits that these issues were not preserved for appeal and that appellate relief will be granted only to avoid manifest injustice. *Van Dorsten, supra* at 544-545.

Defendant first argues that the prosecution's case was based wholly on the victim's testimony, and that inconsistencies between the victim's preliminary examination testimony and trial testimony establish that the victim was lying at trial, a fact of which the prosecutor was either aware or should have been aware.

The test of prosecutorial misconduct is whether the defendant was denied a fair and impartial trial. *People v Paquette*, 214 Mich App 336, 342; 543 NW2d 342 (1995). Prosecutorial misconduct issues are decided on a case-by-case basis, and the reviewing court must examine the pertinent portion of the record and evaluate a prosecutor's remarks in context. *People v LeGrone*, 205 Mich App 77, 82; 517 NW2d 270 (1994).

A prosecutor may not knowingly use false testimony to obtain a conviction. *People v Lester*, 232 Mich App 262, 276; 591 NW2d 267 (1998). A prosecutor also has a constitutional obligation to report to the defendant and the trial court whenever a government witness lies under oath, and a duty to correct false evidence. *Id.* at 276. However, a prosecutor's failure to correct false testimony does not require automatic reversal. A new trial is required only if the false testimony could in any reasonable likelihood have affected the judgment of the jury. *Id.* at 280. In this case, it is unlikely that the alleged false testimony of the victim would have affected the judgment of the jury. While the victim's trial testimony may have conflicted in part with his testimony at the preliminary examination, the conflicting trial testimony was either confirmed by the defendant's mother's testimony or was actually favorable to defendant's case. Thus, assuming the prosecutor knowingly used false testimony, defendant's claim fails because he was not denied a fair and impartial trial by the testimony at issue.

Defendant also argues that the trial testimony of the police officer who took the victim's statement after the incident should be questioned because it was based on inadmissible hearsay. Defendant cites *Moncrief v Detroit*, 398 Mich 181, 189-190; 247 NW2d 783 (1976), in which the Court noted:

Because police reports are generally offered to prove the truth of their contents, their use as evidence at trial constitutes hearsay. Therefore, before they may be admitted into evidence, read into the record, or read to the fact finder by a witness in the course of his testimony, the proponent of the evidence must lay a foundation which establishes an exception to the hearsay rule.

In this case, because the police officer was testifying, the only hearsay involved in her report is her account of the victim's statements. The prosecution argued that the statements were admissible as excited utterances. MRE 803(2). Defendant's counsel objected on foundation grounds. The prosecutor then laid further foundation, without objection, and the statements were admitted.

Even assuming error, we conclude it was harmless. The non-hearsay evidence connecting defendant with this crime was strong, and the victim himself testified at trial and thus supplied the jury with the basic facts establishing the elements of the crime. Therefore, we conclude any error was harmless.

Defendant next argues that trial counsel was ineffective for failing to investigate, locate potential witnesses and prepare his defenses. Defendant contends that the witnesses that were not located or should have been called at trial were important to his case because they could have testified that the victim may have fallen and actually suffered the injuries two days prior to the charged assault. As stated previously, the outcome would not have been affected by these potential witnesses because there was objective testimony concerning the nature and extent of the fresh injuries observed. Accordingly, defendant's claim of ineffective assistance fails.

Defendant's remaining claims in his supplemental brief echo claims asserted in his initial brief and are adequately addressed above, and we reject defendant's request for a remand for a Ginther<sup>2</sup> hearing to determine whether his trial and appellate counsel were ineffective.

Affirmed.

/s/ Helene N. White

/s/ Harold Hood

/s/ Kathleen Jansen

<sup>1</sup> The jury was instructed that the prosecutor must prove, as the third element, "that at the time of the assault, the defendant took money that did not belong to him," and as the sixth element, "that at the time he took the money, the defendant intended to take it away from the complainant permanently."

<sup>2</sup> *People v Ginther*, 390 Mich 436, 212 NW2d 922 (1973).